STATE OF ALASKA
v.
ELSIE JOHN

IBLA 79-337 Decided March 19, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, holding Native allotment application for approval and rejecting State selection application.

Set aside and remanded.

1. Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments -- Appeals -- Contests and Protests: Generally -- Rules of Practice: Government Contests -- Rules of Practice: Private Contests

Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from an interlocutory decision which authorizes the State to initiate private contest proceedings to prove lack of qualification on the part of the Native. Rather, it may initiate the private contest within the time period prescribed, or it may appeal the decision of BLM, after it becomes final, to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it

finds the allotment application acceptable, it will order the allotment issued, all else being regular.

APPEARANCES: Barbara J. Miracle, Esq., Assistant Attorney General, for the State of Alaska; Elsie John, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The State of Alaska has appealed from a decision dated March 14, 1979, of the Alaska State Office, Bureau of Land Management (BLM), holding for approval Native allotment application F-026789, made pursuant to the Act of May 17, 1906, 34 Stat. 197, as amended (hereinafter the Alaska Native Allotment Act), and holding for rejection State selections F-026809 and F-026789, made pursuant to the Alaska Statehood Act, 72 Stat. 339, as amended, 48 U.S.C. Chap. 2 (1976), to the extent of any conflict with the allotment application. 1/

The State was given 30 days from receipt of the decision to initiate a private contest, pursuant to 43 CFR 4.450, challenging the applicant's compliance with the use and occupancy provisions of the Alaska Native Allotment Act. Under the decision, failure to initiate a private contest would "result in the Native allotment being approved and the State selection being rejected" to the extent of any conflict. The decision noted that "this action will become final without further notice."

The BLM decision also contained a standard appeals paragraph to the following effect: "In accordance with the regulations in 43 CFR 4.400, the State of Alaska has the right of appeal to the Board of Land Appeals."

[1] The State of Alaska appealed to this Board within the 30 days in which they could initiate a private contest. However, the decision appealed from was interlocutory in nature and not subject to appeal at that time. State of Alaska, 42 IBLA 94 (1979); State of Alaska, 41 IBLA 309 (1979). Upon notification by the BLM State Office that it intends to grant the Native allotment and reject the State selection to the extent of any conflict, the State of Alaska is required to make an election of remedies. It may initiate a private

1/ The State of Alaska has filed no statement of reasons for appeal. Under the applicable regulation, 43 CFR 4.402, the appeal of the State in such a case would be subject to summary dismissal. State of Alaska, 42 IBLA 94 (1979). The State of Alaska apparently relied on the relaxed procedural standards applicable to Native allotment appeals arising in Alaska. As we noted in State of Alaska, supra, those procedures, while expressly revoked for future appeals, would nevertheless be followed for all appeals then pending. This appeal was pending prior to that decision.

contest within the terms of the decision; or it may permit the decision to become final waiving its right to bring a private contest and appeal to this Board for a determination whether a Government contest complaint should issue against the allotment claim. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the allotment issued, all else being regular. See State of Alaska, 42 IBLA 94 (1979); State of Alaska, 41 IBLA 309 (1979); John Nunsunginya, 28 IBLA 83 (1976). In accordance with our decision in State of Alaska, 41 IBLA 309 (1979), the appeal is hereby dismissed as interlocutory, but the State is afforded 60 days from receipt of this decision in which to file a private contest complaint. If no contest complaint is filed, the decision of BLM will become final as of the expiration of 60 days. Within the succeeding 30 days the State may then file an appeal to the Board directed solely to the question of whether a Government contest complaint should issue. 2/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further action consistent herewith.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge

2/ The fact that the decision contained the standard appeals paragraph is of no effect. This Board has the exclusive power to decide who may or may not appeal to it, and the inclusion or omission of the appeals paragraph is not controlling upon the Board's determination. See generally Fancher Brothers, 33 IBLA 262 (1978); Frank and Rene Lock, IBLA 76-608, Order of May 10, 1977. The BLM Manual expressly notes: "A decision may neither grant the right [of appeal] where it does not exist nor withhold it where it does." BLM Manual 1841.15.